Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1122

JAMES E. BROWN, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	14
EXHIBIT A	1a
EXHIBIT B	9a

TABLE OF AUTHORITIES

PAGE

Causey vs. *United States* 352 F.2d 203 13

Evans vs. *United States* 257 F.2d 121,126 (9th Cir. 1958) 14

United States vs. *Busic* 549 F.2d 292 (2nd Cir. 1977) . 12

United States vs. *Gutierrez* 559 F.2d 1278 (5th Cir. 1978) 13

United States vs. *Isaacs* 516 F.2d 409 (5th Cir. 1975) . 13

United States vs. *Jackson* 560 F.2d 112 (2nd Cir. 1977) 12

United States vs. *Malatesta* 590 F.2d 1379 (5th Cir. 1979) 13

United States vs. *Mandujano* 499 F.2d 370 (5th Cir. 1974) 11

United States vs. *Nall* 437 F.2d 1177 (5th Cir. 1977) .. 14

United States vs. *Oviedo* 525 F.2d 881 (5th Cir. 1976) 12

United States vs. *Stallworth* 543 F.2d 103a (2nd Cir. 1976) 11,12

United States vs. *Steele* 469 F.2d 165 (10th Cir. 1972). 14

United States vs. *Thomas* 468 F.2d 422 (10th Cir. 1972) 14

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No.

JAMES E. BROWN, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, James E. Brown, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this cause.

OPINION BELOW

The Opinion of the Court of Appeals for the Fifth Circuit is attached hereto as Exhibit "A". The Order of the Fifth Circuit Court of Appeals overruling the Petitioner's Motion for Rehearing dated November 15, 1979 is attached hereto as Exhibit "B".

JURISDICTION

The judgment of the Court of Appeals was entered November 15, 1979. In view of the rules of the United States Court of Appeals for the Fifth Circuit, no petition for rehearing was filed. The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

I.

Whether the District Court erred in overruling Petitioner Brown's Motion for Judgment of Acquittal for attempt to destroy a building, as the evidence was insufficient—or in the alternative, there was no evidence—to sustain the judgment of conviction.

II.

Whether the District Court erred in overruling Petitioner Brown's Motion for Judgment of Acquittal on the conspiracy count, as the evidence was insufficient—or in the alternative, there was no evidence—to establish a conspiracy between Petitioner Brown and Scott to damage and destroy the grocery store in question.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides in part as follows:

> "No person shall. . .be deprived of life, liberty, or property, without due process of law. . ."

STATEMENT OF THE CASE

Petitioner Brown was convicted of attempting to damage and destroy, by means of an explosive, a building in Wills Point, Texas being used in an activity abetting in-

terstate commerce in violation of 18 U.S.C., Section 844(i), for which Petitioner was sentenced to four years confinement in prison; and of knowingly and unlawfully conspiring with David R. Scott to maliciously damage and destroy by means of an explosive, a building, to wit, the Wills Point A.G. Food Store, for which Petitioner Brown was sentenced to four years in prison to run concurrently with the sentence in count one.

The Government's evidence shows that David R. Scott and Petitioner Brown joined in purchasing a grocery store in Wills Point for about $99,990.00 in December, 1975 and thereafter took out insurance in an adequate and proper amount. Scott operated the store and hired a manager to assist.

Throughout the next several years, there was a cash flow problem but the business was continually open for business and was profitable.

In May, 1976 an individual named Scott, Jr. was approached by David R. Scott regarding the purchase of dynamite and when he referred David R. Scott to a local J.P., Scott stated he wanted untraceable dynamite to blow up a place the size of a building. Shortly thereafter, Scott, Jr. approached Scott and suggested that he could get the dynamite but Scott stated he did not need it anymore. Within three weeks of that conversation another grocery store was blown up in the same vicinity but no connection was made between David R. Scott and that transaction. The building Scott had in mind was never identified other than as to size. Scott, Jr. stated that Scott and Petitioner were seen together immediately before the conversation regarding the dynamite.

Charles E. Wernette, a special agent with the Bureau of Alcohol, Tobacco and Firearms, investigated the bombing of a Brookshire's Grocery Store in the area and thereafter met Petitioner on July 20, 1976 at Canton

Motor Company where he talked about the purchase of various merchandise. On July 21 and 22, 1976, Petitioner and Wernette met again and Petitioner asked if he had access to explosives or dynamite and possibly someone to use them. Wernette replied that he could probably come up with explosives and someone to use them. On July 23, 1976, Wernette called Petitioner at Canton, which was recorded and told Petitioner he had been in contact with a man who might be able to help Petitioner but the man wanted to know more. Petitioner told Wernette that it would be a "place", at a figure of about $5,000.00 involving a small town operation (SF 235-239). On August 3, 1976, Wernette talked to Petitioner again at Denney's Restaurant in Dallas. Wernette told Petitioner he had talked to his contact and Petitioner replied "the boom deal?". Wernette said yes and Petitioner emphasized this would have to be done at a certain time under certain conditions and that it was going to be an insurance deal and that the place may be transferred. Petitioner said it was a very small town with about 3,000 population and the building would be about 6,000 square feet, the same building Wernette would see the next day. Petitioner described the construction of the building and stated that it would not burn and that the job should be done and completed probably in a month and a half and Petitioner and Scott were in the process of selling the business (SF 245-247). Petitioner said that if he was going to dynamite the store, he would use six sticks of dynamite, three down each side of the inside; and there would be very little police problem as there was only one officer on duty at night (SF 247,248). A dynamite man could come in about 7:20 p.m. or so before closing time, wait in the back of the store until it closed and then do whatever he was going to do and leave (SF 249). Petitioner told Wernette that there wasn't any particular point in mentioning any of this around Scott, that whatever was al-

right with him was alright with Scott and vice versa (SF 249)

On August 5, 1976, Wernette called Petitioner and Petitioner asked regarding Wernette's license plates which he had checked and were part of a block sold to law enforcement authorities (SF 252).

On August 8, 1976, a Sunday, Wernette met Petitioner at Canton and drove to a country club. Petitioner again brought up the license plates. Petitioner said he had an older man who would check out Wernette's contact to see if he knew what he was doing (SF 255,256). On August 11, 1976, Wernette called Petitioner and Petitioner said the deal was getting a little stronger, possibly. He said his partner would be in the store before 7:30 and that he could tell Wernette about the deal. Petitioner said he would like to be at the store to show Wernette and his contact around (SF 259-260).

On August 13, 1976, Wernette and special agent Bowers (the supposed explosives expert) met Petitioner at Canton. Petitioner immediately referred to the previous arrangements then when introduced to Bowers told Bowers he wanted the building totaled, flat level to the ground (SF 263,264). After some discussion with Bowers for arrangements for paying for the explosives and obtaining them, Petitioner directed Wernette and Bowers to the store, telling them that they would know the man to see at the store. Wernette and Bowers went to the grocery store at Wills Point, met Scott in an office area inside the front door, and greeted one another. Scott said he was expecting them, that Petitioner told him they were coming. Petitioner showed both through the entire store and out into the back and into the alley. Nothing was ever said about explosives by Scott (SF 266-268). They talked about construction of the store only but the substance of the entire conversation with Scott was the same as one which would

have been conducted with a purchaser of a building (SF 292). They did not know if Petitioner had told Scott that these men were interested in buying the building (SF 292). Before going to the store, Petitioner had told them it should be done on a Saturday or Sunday night, because it would be more profitable (SF 269).

On August 16, 1976, Wernette called Petitioner and there was a conversation regarding Bowers producing the explosives and Petitioner reimbursing him for the expenses entailed. (SF 271).

On August 23, 1976, Wernette, Bowers, and Scott met at Denney's. When they showed Scott some military composition C-4 and dynamite and blasting caps, Scott said he did not know what it was and when referred to Petitioner's conversation, Scott said that he was not following them and denied knowing anything about any plan to blow any store up in Wills Point. When asked why he had given them a tour of the store, Scott replied that he had just wanted them to see the store and laughed. He later said that Petitioner did not want any C-4 (SF 274-274, 283,284,296,297,312). On one occasion Scott did tell Wernette that he was thinking about selling the grocery store (SF 295) but at no time did Wernette ever discuss with Scott the blowing up of Scott's Store in Wills Point (SF 295,296).

Wernette admitted that in no recorded conversation was the word "dynamite" used although it was used in some conversation not recorded (SF 280,281). Scott never said anything about wanting explosives or attempting to buy explosives (SF 282,310). When all conversations and contact between law enforcement authorities and Petitioner and Scott were broken off, the store was still in business up until August 15, 1977, when it was destroyed by fire (SF 283,284). The last contact with Scott and Petitioner was on August 26, 1976.

Wernette stated that Petitioner never bought any explosives and never made a contract for Bowers' services to blow up any store (SF 317,318). Doris Jeffries, a special agent with the Alcohol, Tobacco and Firearms Bureau, met Wernette, Scott and Petitioner at Denney's in Dallas on August 3, 1976. Wernette and Petitioner left the restaurant at one point and then she and Scott left. Scott said that he was in the grocery business but would not be in it for long (SF 324), because it was too hard. She asked why Wernette and Petitioner went outside and Scott stated that "they have got a big deal going" (SF 324).

Roger Bowers testified that on August 13, 1976, he met Petitioner and played the role of an expert explosives man; that he had a conversation with Petitioner regarding blowing up a store at Wills Point and that he wanted it done within a two month period on a Saturday or Sunday, at a price of $5,000.00 (SF 350-352). He and Wernette then went to the store and met Scott.

On August 23, 1976, Bowers stated Scott denied wanting anything to do with the explosives he was shown by Wernette and Bowers (SF 358-364). No money ever changed hands (SF 375); no explosives were ever bought or used (SF 376-379); and there was not further contact with Scott and Petitioner after August 23, 1976.

On August 29, 1976, J.E. Tuma, a Dallas Fire Department official and arson investigator, investigated the fire which occurred August 15, 1977. The point of origin of the fire was the front of the store where a flammable liquid burn pattern was observed on the floor tile. Tuma took three samples, one which bore the odor of gas. The fire started via a low grade gas explosion caused when vapors accumulated and ignited. The fire was intentionally set (SF 493-498). There was no evidence of any dynamite explosion (SF 506,507). There was a football-sized hole in the front window and the point of the origin of the fire

began fifteen feet away from this opening (SF 507-509). The fire was consistent with being lit with a match (SF 520). No gas container was found (SF 522).

REASONS FOR GRANTING THE WRIT

I. The District Court Erred In Overruling Petitioner Brown's Motion For Judgment Of Acquittal As To Count One, As The Evidence Is Insufficient To Sustain The Judgment Of Conviction For An Attempt To Destroy A Building.

The evidence shows that the building in question was purchased by Scott and Petitioner Brown on December 19, 1975 and that thereafter Scott and a Manager he employed operated the business on a successful basis. Both Petitioner and Scott were partners in the venture. During periods of time of the operation of the store, there was a certain cash flow problem but the bills were always paid and merchandise ordered from the wholesale outlet in Dallas.

Scott purchased an appropriate amount of insurance which was felt to be reasonable and adequate and not excessive in the amount of $65,000.00 on the building and $90,000.00 on its contents plus an earnings insurance. After the destruction of the building, Scott submitted a proof of loss dated September 13, 1977 in the amount of the insurance on the building and contents (SF 140-141).

Special Agent Wernette met with Petitioner at Canton Motor Company while he was investigating another fire at Brookshire's Grocery Store, a matter unrelated to the fire in this case and talked about the purchase of various other merchandise. Petitioner asked him if he had access to explosives or dynamite and possibly someone to use them and Wernette stated that he could probably come up with some explosives and someone to use them. Petitioner asked if he was familiar with the recent explosion in the Wills

Point area and Wernette indicated that he had heard of it (SF 233).

On July 23, 1976, Wernette called Petitioner at Canton Motors, which conversation was recorded (SF 409,439). Petitioner and Wernette talked in general as to whether the explosives man Wernette was to furnish would be used on a one-time deal only, whether the job involved people or a place. It was a small-time deal valued at about "five". Subsequently on the same date, Wernette advised Brown that he had talked to his contact about the "boom deal" and that he was interested but wanted to know more about the job. Petitioner stated that it had something to do with insurance, that the place was going to be transferred. The place was located in a town of 3,000; it had 6,000 square feet. Petitioner gave a detailed description of the construction and stated that it would not burn (SF 421-422). Petitioner wanted the job done in one and a half to three months, prior to the transfer because it was going to be sold. Petitioner stated how it should be blown up if he was going to do it (SF 427-429). Petitioner did not want to put up any front money and Wernette stated that the explosive man might not require it but these were details "we'll have to work out" (SF 435). Wernette and Petitioner agreed to meet the following Sunday. Petitioner then stated that "we don't really ever need to talk about this other with Mr. Scott. .everything's okay with him. What I do is okay with him, and what he does is okay with me" (SF 438,439).

On August 5, 1976, Wernette called Petitioner, which conversation was recorded again and made arrangements for a later meeting. During this conversation, Petitioner asked Wernette where he got his license plates (SF 440).

The following Sunday, August 7, Wernette met Petitioner at Canton Motors and drove to a country club. Petitioner asked Wernette how he was going to verify who he

was and Wernette tendered Petitioner various undercover identifications in a billfold. Petitioner asked again about his license plates and told Wernette that his had been issued in a block given to a law enforcement agency in Dallas. Petitioner told Wernette he would check out Wernette's man when he was produced to see if he really knew what he was talking about and knew how to use explosives.

On August 11, 1976, in a recorded conversation, Petitioner stated that "our deal is getting a little stronger, possibly". Petitioner asked him if he wanted to look at the store and see the inventory and Wernette said yes, that he did and that his contact wanted to know more but Petitioner did not want to talk further until they had seen the store and suggested they meet late in the evening. On the same date, Wernette contacted Petitioner and talked concerning the purchase of one hundred cases of coffee (SF 457-461).

On August 13, 1976, Wernette and special agent Bowers (the explosives man) met Petitioner at Canton. When asked by Bowers the price for the job, Petitioner stated that he had told Wernette that it was nothing definite yet but it should run $5,000.00 and that for that kind of money Petitioner expected the building "flat level to the ground". Bowers stated that he was going to go look at the building so he would know something about it, that he was not going to get involved in something that he was not familiar with (SF 463,463). Petitioner stated that it would not burn that he wanted it totaled out. Petitioner told Bowers and Wernette that if the job could be done and Petitioner decided he wanted it done that they could negotiate the rest of the deal (SF 466). Petitioner again described the building in some detail (SF 468-70). The job had to be done on a Saturday (SF 471). Bowers told Petitioner that if Petitioner decided he wanted the job done and Bowers

to get the "stuff", Bowers would require two weeks notice (SF 472).

Wernette testified that on August 13, 1976, Bowers and he went to the store in question, saw Scott, walked through the store and talked concerning the construction of the store.

On August 16, 1976, Wernette called Petitioner again and Petitioner asked what "weird beard" (Bowers) had to say. Wernette stated that Bowers thought the job would work, that he was willing to go but still wanted something (SF 476-480). Petitioner stated that nothing was going on in the next several days (SF 480). Petitioner told Wernette that Bowers would get at least what Bowers put into the deal (SF 478).

On August 23, 1976, Scott met Wernette and Bowers at Denney's in Dallas, which conversation was recorded. When they showed Scott explosives in the back of a trunk, Scott denied any knowledge of what was going on and said he had no need for any of the explosives.

In *United States* vs. *Mandujano,* 499 F.2d 370 (5th Circuit, 1974) this Court spoke of the type of conduct which would constitute a criminal attempt. The accused must have been acting with a kind of culpability otherwise required for the commission of the crime with which he is charged with attempting and must have engaged in conduct which constitutes a substantial step toward commission of the crime. A substantial step must be conduct strongly corroborative of the firmness of the defendant's criminal intent. The Court emphasized that the terms "substantial step" indicated that the conduct must be more than remote preparation and that the requirement of the conduct be strongly corroborative of the firmness of the defendant's criminal intent also related to the requirement that the conduct be more than "mere preparation". See also *United States* vs. *Stallworth* 543 F.2d 103a (2nd Circuit, 1976).

As noted in footnote four of *Stallworth Supra.,*:

> "Preparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it rendered the crime so probable that the act will be a misdemeanor, although there is still a locus poenitetiae, in the need of a further exertion of the will to complete the crime."

See also Section 5.01 of the Model Penal Code, re criminal attempt and conduct which may be held substantial.

As noted in *United States* vs. *Jackson* 560 F.2d 112 (2nd Circuit, 1977), there is no comprehensive statutory definition of attempt in federal law. Rather, attempt is a subtle concept that requires a rational and logically sound definition, one that enables society to punish malefactors who have unequivocally set out upon a criminal course without requiring law enforcement officers to delay until innocent bystanders are imperiled. See also *United States* vs. *Oviedo* 525 F.2d 881 (5th Circuit, 1976); *United States* vs. *Busic* 549 F.2d 292 (2nd Circuit, 1977).

Petitioner submits that while certainly the conversations testified to by the agents and the tapes recorded of most of the conversations indicated at least a tentative consideration by Petitioner Brown of blowing up a grocery store, the substance of the conversations were all tentative, provisional in nature and were at best preparatory acts. No agreement was ever reached between Petitioner Brown and either Wernette or Bowers to hire Bowers to blow up the building. No time was ever selected to blow up the building which in fact was not destroyed for another year and then, by fire, which was never connected to Petitioner Brown. Petitioner Brown never paid any monies or accepted any explosives. Bowers never agreed to do the job and the last conversation indicated there was some dis-

agreement about reimbursement for expenses of the explosives.

The conversations clearly show Petitioner Brown was simply talking about a matter he might get involved in at some future time but had not made his mind up to actually embark upon the task. The talk never materialized into any serious attempt to destroy property (SF 463,466, 470,472,480).

As all the evidence shows as a matter of law that the conduct in question was at best preparatory in nature and not an attempt, the judgment of conviction should be set aside and a judgment of acquittal entered.

II. The District Court Erred In Overruling Petitioner Brown's Motion For Judgment Of Acquittal As To Count Two Of The Indictment, As The Evidence Is Insufficient To Prove That Brown And Scott Entered Into A Conspiracy To Damage And Destroy The Grocery Store In Question.

To constitute a conspiracy, it is necessary to show beyond a reasonable doubt an agreement between two or more persons to act together in committing an offense and an overt act in furtherance of the conspiracy. *United States* vs. *Malatesta* 590 F.2d 1379 (5th Circuit, 1979); *United States* vs. *Isaacs* 516 F.2d 409 (5th Circuit, 1975). The evidence of knowledge must be clear and not equivocal, and a suspicion however strong is insufficient. *Causey* vs. *United States* 352 F.2d 203 (5th Circuit, 1965); *United States* vs. *Gutierrez* 559 F.2d 1278 (5th Circuit, 1978).

There must be at least two participants in a conspiracy; one cannot conspire with himself. There must be some testimony from which it can be inferred that an agreement between two parties actually existed. Under no circumstances will guilt be inferred from mere association.

United States vs. *Thomas* 468 F.2d 422 (10th Circuit, 1972); *United States* vs. *Steele* 469 F.2d 165 (10th Circuit, 1972); *Evans* vs. *United States* 257 F.2d 121, 126 (9th Circuit, 1958); *United States* vs. *Nall* 437 F.2d 1177 (5th Circuit, 1977).

CONCLUSION

Petitioner submits that the evidence only shows Petitioner and Scott were friends and associates in a business venture, were seen together at the time of a conversation concerning dynamite at one point in time and that Federal undercover officers visited his store and that at the visit Scott's comments could be construed as those of one desiring to sell his store (as Scott did desire to do), and that when confronted for the very first time by the Federal agents with the dynamite and the suggestion of blowing up the store, Scott vehemently denied any knowledge or participation or agreement in the plan.

Petitioner submits that there is a complete absence of any proof to show an agreement and thus no evidence exists in the record to establish a conspiracy. The judgment of conviction should therefore be reversed and a judgment of acquittal entered.

For the reasons set forth above, Petitioner respectfully submits that a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

EXHIBIT A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

No. 78-5345.

UNITED STATES of AMERICA,
Plaintiff-Appellee,

v.

JAMES E. BROWN and DAVID R. SCOTT,
Defendants-Appellants.

Oct. 9, 1979.

Appeals from the United States District Court for the Eastern District of Texas

Before TJOFLAT and VANCE, Circuit Judges, and ALLGOOD, District Judge.

VANCE, Circuit Judge:

This prosecution involves an alleged attempt and conspiracy by James E. Brown and David R. Scott during the summer of 1976 to have their grocery store in Wills Point, Texas, blown up. The events began in May 1976 when Scott sought information about purchasing untraceable explosives to blow up a building. A series of negotiations between Brown and undercover agents of the Bureau of Alcohol, Tobacco and Firearms concerning employment of an explosives expert to blow up the store ensued. The relevant sequence of events terminated on August 26, 1976, when contact between defendants and the undercover agents was broken off. Demolition of the store did not take place.

In December 1975, Brown and Scott borrowed approximately one hundred thousand dollars and purchased the store. They experienced cash flow problems, and their principal supplier put them on a cashier's check paying basis. In the summer of 1977 defendants agreed to sell the store including building,

fixtures and merchandise to their store manager for one hundred five thousand dollars. On August 15, 1977, however, before the sale was closed, the store was totally destroyed by a fire that had been intentionally set. The identity of the arsonist has not been established. Scott filed a proof of loss claiming the full insurance coverage of one hundred sixty-five thousand dollars.

After the store was destroyed in the 1977 fire a federal grand jury returned indictments against defendants arising out of the 1976 events. Brown was charged in Count One with violating 18 U.S.C. § 844(i) by attempting to destroy by means of an explosive a building used in interstate commerce. In Count Two both defendants were charged with violating 18 U.S.C. § 371 by conspiring to destroy by means of an explosive a building used in interstate commerce. A jury found defendants guilty as charged.

On appeal they advance two challenges to the sufficiency of the evidence.[1] The first is whether the evidence established Brown's guilt of an attempt to blow up the building. The second concerns the sufficiency of the evidence of conspiracy particularly with respect to Scott. Familiar standards govern our review of both questions. We take the view of the evidence most favorable to the government, *Glasser* v. *United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), and we must sustain the denial of a motion for judgment of acquittal if a reasonable jury might decide that the evidence is inconsistent with every reasonable theory of defendants' innocence. *United States* v. *Fredericks,* 586 F.2d 470, 474 (5th Cir. 1978), *cert. denied,*

[1] We also reject Scott's complaint concerning the denial of his request for an instruction that his exculpatory statement must be disproved by the government. Scott relies on *Grady* v. *State,* 466 S.W.2d 770 (Tex.Cr.App.1971) for the holding that such an instruction is required under Texas state practice. The government concedes the existence of the state rule, but argues that it is subject to applicable exceptions. More importantly it points out that the rule is peculiar to the law of Texas and not binding on this court. *See* Annot., 116 A.L.R. 1460 (1938). Scott cites no precedent in which such an instruction is held to be mandatory by this or any other federal court.

_____ U.S. _____, 99 S.Ct. 1507, 59 L.Ed.2d 776 (1979); *United States* v. *Warner,* 441 F.2d 821, 825 (5th Cir.), *cert. denied,* 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58 (1971).

I.

Brown does not contest that he had extensive conversations with A.T.F. undercover agents concerning blowing up the building. In fact he participated in five meetings and four telephone conversations. Many of the conversations were recorded, and the tapes were in evidence. Brown contends that this was nothing more than mere preparation and that preparation is not an attempt.

The meetings between Brown and A.T.F. agent Wernette began in Canton, Texas, on July 20, 1976, some two months after Scott first inquired about untraceable explosives. In an early meeting Brown asked the agent whether he had access to explosives and a man to use them. A few days later the agent told Brown he could get a man. Brown said he was willing to pay $5,000 and was interested in talking about it real soon.

At their next meeting ten days later in Dallas, Wernette told Brown that his man was interested. Brown described the building to be destroyed and told the agent it was at Wills Point, Texas. he told Wernette that it would have to be done at a certain time and that it was going to be an insurance deal. He mentioned an additional $25,000 in insurance. Brown told the agent the method he would use in blowing up the building, but said having someone else do it was worth $5,000 because it was so close to home.

On August 11, 1976, Brown told Wernette that he would like the explosives man to look at the building. He volunteered to show Wernette and the expert around the store, but said that in any case his partner would be at the store any time before 7:30 and that he would know more about the exact dimensions. Two days later Wernette introduced Brown to a second undercover agent, Bowers, who pretended to be the explosives man. Brown said the job should run around $5,000 and for that amount he would want the building flat level to the ground.

They discussed structural details, the amount of explosives needed, the time frame and the escape route to be used in leaving the building. Brown wanted the job done on a Saturday because it would be more profitable. Brown discussed procurement of the explosives with Bowers and agreed that if Bowers could come up with the explosives he would reimburse him. The two agents left to inspect the building. Brown had told Bowers that Wernette knew who to see when they arrived at the store. They went to the store and were shown around by Scott.

Three days later Brown and Wernette had a telephone conversation in which Wernette said that Bowers was willing to go ahead but that he still wanted something, referring to an advance of money for expenses. Brown said he thought that they were in agreement and confirmed that Bowers would be reimbursed for expenses in acquiring the explosives.

The last contact between the agents and Scott was on August 23, 1976. After that meeting no relevant events took place. No explosion occurred, and no money ever changed hands.

The question squarely presented by Brown on appeal is whether his conduct was sufficient to constitute an attempt or whether, as he contends, it was mere preparation. The problem of distinguishing preparation from an attempt under varying facts has caused recurring difficulty. The principles on which our resolution of the present problem will be based are found in *United States* v. *Mandujano*, 499 F.2d 370 (5th Cir. 1974), *cert. denied*, 419 U.S. 1114, 95 S.Ct. 792, 42 L.Ed.2d 812 (1975), as refined by *United States* v. *Oviedo*, 525 F.2d 881 (5th Cir. 1976) and *United States* v. *Rivero*, 532 F.2d 450 (5th Cir. 1976). *Rivero* distills from Judge Rives' opinion in *Mandujano* the following formulation:

> First, the defendant must have been acting with the kind of culpability otherwise required for the commission of the crime which he is charged with attempting. . . .
>
> Second, the defendant must have engaged in conduct which constitutes a substantial step toward commission of the crime. A substantial step must be conduct strongly corroborative of the firmness of the defendant's criminal intent.

532 F.2d at 455 (quoting 499 F.2d at 376) *Oviedo* emphasizes the requirement that

> the objective acts performed, without any reliance on the accompanying *mens rea*, mark[ed] the defendant's conduct as criminal in nature.

525 F.2d at 885.

Brown's conduct clearly met the first of the stated *Mandujano* tests. Our consideration at this point focuses on the second. Did Brown's conduct include the taking of such a substantial step that it crossed the line from mere preparation? Did it strongly corroborate the firmness of his criminal intent and make his conduct criminal in nature? We conclude that it did in each of two particulars.

In *Mandujano* the court used the American Law Institute's Model Penal Code in its analysis and quoted from it at some length. 499 F.2d at 377 n. 6. Immediately subsequent to quoted portions the Code also contains the following:

> Without negativing the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:
>
> . . . . . .
>
> (c) reconnoitering the place contemplated for the commission of the crime.
>
> . . . . . .
>
> (f). . . collection . . . of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such . . . collection . . . serves no lawful purpose of the actor under the circumstances . . . .

Model Penal Code § 5.01 (Proposed Official Draft 1962).

Viewed as we must view it on appeal, the evidence shows that Brown (1) made a firm agreement with Bowers for acquisition of the explosives needed to blow up the store and (2) dispatched Wernette and Bowers to reconnoiter and inspect the building in preparation for its destruction. In both instances he engaged in conduct that met the second *Mandujano* test. We,

therefore, conclude that the evidence was sufficient to support the jury's finding that he was guilty of an attempt.

II.

Scott correctly contends that, wholly aside from Brown's attempt, his guilt depends on proof that a conspiracy existed, that he knew about it and that he voluntarily joined it. He points out that suspicion is not enough and that his guilt will not be inferred from mere association with Brown.

Although the evidence may be circumstantial, it must prove Scott's guilt beyond a reasonable doubt. Scott concedes in brief that, if existence of a conspiracy were shown, evidence of his connection might be slight. After the filing of Scott's brief, however, this court sitting *en banc* repudiated the so-called slight evidence rule. *United States* v. *Malatesta,* 590 F.2d 1379 (5th Cir.), *cert. denied,* _____ U.S. _____, 99 S.Ct. 1508, 59 L.Ed.2d 777 (1979). Even prior to *Malatesta,* the government could derive no benefit from the slight evidence rule since Scott's connection was necessary to the very existence of the two-man conspiracy. That connection must have been proved beyond a reasonable doubt for the conviction of either defendant under Count Two to stand.

The evidence against Scott begn with his inquiries about untraceable dynamite for use in blowing up a place about the size of a building at Brown's father's place of business. Immediately before the inquiry he was seen with Brown. Scott was Brown's partner in a grocery enterprise that the jury could have concluded was in financial difficulty. Scott handled the insurance for the partnership and placed enough coverage on the store so that the amount of the insurance exceeded by sixty thousand dollars the amount for which they later agreed to sell the business. Scott accompanied Brown to the August 3, 1976, meeting with undercover agent Wernette, who was accompanied by agent Doris Jefferies. When Brown and Wernette went outside for their discussion, Scott told Doris Jefferies that he was in the grocery business but would not be for long. She asked Scott why Brown and Wernette went outside, and Scott replied that they had a big deal going.

Finally, when Wernette and Bowers were sent by Brown to the store to inspect the building, they were met by Scott who stated that he had been expecting them. There was no discussion about blowing it up, but the tour of the store conducted by Scott included the structural features of the building, the location of the back door, and things that Brown and the agents had discussed as things that the bomber would need to know.

Scott relies heavily on his meeting with the agents on August 23, 1976, when they showed him what they described as explosives. Scott denied any interest in them. Wernette asked Scott why he had shown the agents around the store. Laughing, Scott remarked that he thought they might like to see it. Before this court Scott argues that the conversation contained exculpatory statements. Because the conversation was recorded both the jury and this court have heard it. From the conversations's content, Scott's tone of voice and his inflection the jury may well have determined as we do that, aside from the naked words, Scott's statement did not convey an impression of innocence.[2]

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[2] The jury may have concluded that Scott's manner of speaking, inflection and tone of voice were incompatible with the literal meaning of the words used and, indeed, conveyed the opposite meaning. Weinstein says of Federal Rule of Evidence 801(d)(2), "The rule makes no attempt to categorize the myriad ways in which a party . . . may make an admission. Admissions can be made expressly or may be inferred from conduct." Weinstein's Evidence 801(d)(2)(A)[01] at 801-118 (1978). Among the supporting authorities cited is our opinion in *United States* v. *Nakaladski,* 481 F.2d 289, 300-301 (5th Cir.), *cert. denied,* 414 U.S. 1064, 94 S.Ct. 570, 38 L.Ed.2d 469 (1973), holding that a smile constituted an admission. If the jury concluded that the exculpatory words used by Scott were false, they could have regarded the statement itself as tending to show consciousness of guilt. *Wilson* v. *United States,* 162 U.S. 613, 16 S.Ct. 895, 40 L.Ed. 1090 (1896); *United States* v. *Sutherland,* 463 F.2d 641 (5th Cir.), *cert. denied,* 409 U.S. 1078, 93 S.Ct. 698, 34 L.Ed.2d 668 (1972); *United States* v. *Rajewski, 526 F.2d 149 (7th Cir. 1975), cert. denied,* 426 U.S. 908, 96 S.Ct. 2231, 48 L.Ed.2d 833 (1976); *United States* v. *Matousek,* 483 F.2d 286 (8th Cir. 1973). In *Rajewski* the court said, "It is well settled that untrue exculpatory statements may be considered as circumstantial evidence of the defendant's consciousness of guilt." 526 F.2d at 158.

We conclude as this court did in *Rodriguez* v. *United States*, 373 F.2d 17, 18 (5th Cir. 1967), that, although Scott may have exercised circumspection and restraint in dealing with the A.T.F. agents, the evidence demonstrates a great deal more than mere association with Brown. Entirely disregarding Brown's declarations that linked Scott to the alleged conspiracy, there was ample independent evidence from which a jury could exclude every reasonable hypothesis other than Scott's active, knowledgeable participation as part and parcel of his partner's scheme.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-5345

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

versus

JAMES E. BROWN,

AND

DAVID R. SCOTT, *Defendants-Appellants*

Appeals From The United States District Court
For The Eastern District Of Texas

ON PETITIONS FOR REHEARING
FILED NOV 15 1979

Before Tjoflat and Vance, Circuit Judges, and Allgood, District Judge.*

Per Curiam:

It Is Ordered that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby DENIED.

Entered for the Court:

United States Circuit Judge

* District Judge of the Northern District of Alabama, sitting by designation.

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